In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1431

JOHNSON OIL COMPANY, INC.,

Petitioner

v.

MOUNTAIN FUEL SUPPLY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF MOUNTAIN FUEL SUPPLY COMPANY IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF MOUNTAIN FUEL SUPPLY COMPANY IN OPPOSITION

The Respondent, Mountain Fuel Supply Company (hereafter MOUNTAIN FUEL) respectfully submits this Brief pursuant to Rule 24 of the Rules of Practice of this Honorable Court and urges that this Court deny the Petition for Writ of Certiorari of Johnson Oil Company (hereafter JOHNSON OIL) which seeks review of the Opinion of the Court

of Appeals for the Tenth Circuit in Case Nos. 77-1410 and 77-1432 reported at 586 F.2d 1375 (10 Cir. 1978).

JURISDICTIONAL BASIS OF JOHNSON OIL PETITION FOR CERTIORARI

JOHNSON OIL rests its Petition for Certiorari herein upon the omnibus Certiorari Statute, 28 U.S.C. 1254(1). The Tenth Circuit issued its opinion in the Case on November 22, 1978 dismissing both the appeal of JOHNSON OIL and the cross-appeal of MOUNTAIN FUEL. On December 20, 1978, the Tenth Circuit denied Petitions for Rehearing filed by both parties to the litigation. The Petition of JOHNSON OIL is improvidently laid under the Staute and does not meet the foundation and fundamental prerequisites with respect to granting Certiorari review by this Court pursuant to Rule 19 of the Rules of Practice and of the law of the case.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS RAISED BY JOHNSON OIL

JOHNSON OIL does not urge that its Petition for Certiorari is bottomed on the contradiction of any constitutional right. Rather, it fastens its claim for certiorari review to certain sections of the Economic Stabilization Act of 1970 and the Emergency Petroleum Allocation Act of 1973.
They are:

15 U.S.C. §754(a)(1) of the Emergency Petroleum Allocation Act.

Sections 205-207 and 209-211 of the Economic Stabilization Act as incorporated by reference within 15 U.S.C. §754(a)(1).

12 U.S.C. §1904 Note, the 1970 Emergency Stabilization Act.

QUESTIONS PRESENTED FOR REVIEW

1. Is JOHNSON OIL entitled to pursue its Petition for Certiorari herein when MOUNTAIN FUEL has, subsequent to the mandate of the Tenth Circuit being entered in the District Court, made full payment and satisfaction of Judgment with the Registry of the Court and JOHNSON OIL has voluntarily withdrawn and recovered said funds in satisfaction of the judgment?

2. Is certiorari review jurisdiction available to JOHNSON OIL with respect to the decision of the Tenth Circuit Court of Appeals which is not in conflict with any decision of the Temporary Emergency Court of Appeals or of the Supreme Court?

3. Is certiorari review jurisdiction available to JOHNSON OIL with respect to a question which, under the attendant facts, is insubstantial?

4. Is there a direct and inexorable nexus between the appeal of JOHNSON OIL for punitive damages against MOUNTAIN FUEL and the TECA issues that MOUNTAIN FUEL violated the express provisions of the 1973 Emergency Petroleum Allocation Act or the pricing provisions of the 1970 Economic Stabilization Act?

5. If this Court were to grant a Writ of Certiorari based on the Petition of JOHNSON OIL, should the Court take and hear the full case, including the cross-appeal of MOUNTAIN FUEL before the Tenth Circuit?

STATEMENT OF THE CASE

While the Petition of JOHNSON OIL herein is correct in some parts, it falls quite short of a complete accounting of the facts of the matter necessary to a full assessment by this Court of the Certiorari Petition, including the crucial questions of subject matter jurisdiction as analyzed by the Tenth Circuit.

As a result of this deficiency of JOHNSON OIL, MOUNTAIN FUEL sets out, in capsule form, its own Statement of the Case:

1. MOUNTAIN FUEL filed an action against JOHNSON OIL in the State Court for Utah in June of 1974 wherein judgment was sought for crude oil deliveries sold from MOUNTAIN FUEL's Dry Piney Field. While the MOUNTAIN FUEL action was founded on breach of contract and for monies due and owing, the quantum of recovery was founded upon the regulations of the Cost of Living Council and the Economic Stabilization Act of 1970 (hereafter "ESA"), 12 U.S.C. §1904 Note.

2. JOHNSON OIL initially filed an Answer and Counterclaim in State Court against MOUNTAIN FUEL, later amended, which challenged the constitutional validity of the Emergency Petroleum Allocation Act, (hereafter sometimes referred to as "EPAA" or "Allocation Act"), 15 U.S.C. §751 and the regulations promulgated thereunder. The counterclaim, as well, sought the recovery of civil penalties for claimed overcharges in the sale of Dry Piney crude oil by MOUNTAIN FUEL, which were also alleged to have been made in violation of the Allocation Act.

3. On January 6, 1975, JOHNSON OIL filed a Petition for Removal of the case from the State District Court of Utah to the U.S. District Court for Utah, Central Division, urging, *inter alia*, (i) breach of contract by MOUNTAIN FUEL for failure to make crude oil deliveries to JOHNSON OIL under the Allocation Act, (ii) wrongful interference with a business relationship, (iii) alleged violations of the so-called "freeze" regulations of the Federal Energy Office promulgated under the 1973 Allocation Act with respect to the producer-purchaser relationship, (iv) that sales of "new" and "released" oil to JOHNSON OIL were made at a claimed "illegal" price contrary to the Allocation Act, and (v) civil penalties and treble damages under the ESA as the same are incorporated within the EPAA.

4. Once the case was removed to the Federal side, JOHNSON OIL again amended its Counterclaim to seek *punitive damages* against MOUNTAIN FUEL for the violation of the government "freeze order" in terminating sales of crude oil, for willful breach of contract, and for improper and illegal charges and prices by MOUNTAIN FUEL of crude oil sales to JOHNSON OIL, all in claimed violation of the EPAA and the ESA.

5. By interlocutory Order dated May 26, 1976, the trial Court determined that the authorized and highest posted price under the 1973 Allocation Act (which incorporates the ceiling price provisions of the ESA) was higher, per barrel, than that argued by JOHNSON OIL but a lower per-barrel price than that charged by MOUNTAIN FUEL.

6. In June of 1976, the case was set down for trial by jury on the following questions of fact:

(i) Was JOHNSON OIL in breach of its contract with MOUNTAIN FUEL for failure to pay for crude oil purchases? JOHNSON OIL stipulated at the outset of trial that it owed MOUNTAIN FUEL the sum of $19,-628.50 for crude oil sold and delivered by MOUNTAIN FUEL, the price of said oil being based upon the regulations of the Cost of Living Council under the ESA.

(ii) Was MOUNTAIN FUEL entitled to terminate its contract with JOHNSON OIL for the failure of the latter to pay for the quantity of crude oil sold by MOUNTAIN FUEL at prices MOUNTAIN FUEL determined to be due under the ESA?

(iii) Did MOUNTAIN FUEL wrongfully interfere with the alleged business relationship between JOHNSON OIL and a third party corporation, Allied Chemical? Such issue implicity raised the Allocation Act and regulations thereunder.

(iv) Was JOHNSON OIL entitled to exemplary damages against MOUNTAIN FUEL for what was alleged to be reckless, intentional and wanton disregard for the contractual rights of JOHNSON OIL to receive Dry Piney crude oil pursuant to the Allocation Act and at a price in accordance with Johnson's interpretation of the regulations promulgated under the ESA?

7. The trial Court reserved for post-trial adjudication the claims of JOHNSON OIL with respect to the recovery of civil penalties, statutory overcharges, treble damages and attorneys' fees as provided by the ESA.

8. At the trial of the Case, JOHNSON OIL argued that the foundational basis for its claim of punitive damages against MOUNTAIN FUEL was the "illegal" prices charged by MOUNTAIN FUEL under the ESA and the intentional violation by MOUNTAIN FUEL of the Allocation Act which allegedly "froze" the relationship between producer and buyer. JOHNSON OIL also argued that it was entitled to exemplary damages for selling "new" and "released" oil when JOHNSON OIL was entitled under the ESA and the EPAA to the "old" oil price.

9. On the issues made the subject of trial by jury, a general verdict was returned in favor of JOHNSON OIL in the sum of $65,000.00 compensatory damages and $110,000.00 punitive damages. The trial Court, on a Motion for Directed Verdict filed by MOUNTAIN FUEL, concluded that the punitive damage award to JOHNSON OIL could not stand under the evidence, as to either the counts of breach of contract or business interference and accordingly, the directed verdict Motion was granted and the punitive damage award of $110,000.00 was set aside and struck from the ultimate Judgment.

10. The trial Court thereafter determined that JOHNSON OIL was unentitled to recover treble damages, civil penalties or attorneys' fees and costs under the ESA by Order dated December 23, 1976. A final Judgment on all issues in the litigation was entered by the District Court on May 2, 1977.

11. Exactly one day after the entry of the final Judgment of the trial Court on May 2, 1977, JOHNSON OIL filed its Notice of Appeal with the Tenth Circuit Court of

Appeals. It raised in that appeal all of the questions as to which it had taken an adverse ruling under the ESA and the EPAA. Included therein was the claimed entitlement of JOHNSON OIL to punitive damages, civil penalties, treble damages, attorneys' fees and costs. The claim of JOHNSON OIL for punitive damages, as well as the punitive damage defenses of MOUNTAIN FUEL, were inextricably connected to a judicial review of the administrative regulations under the ESA and the Allocation Act of 1973, having a nexus to the federal pricing and allocations policies on crude oil.

12. MOUNTAIN FUEL filed a cross-appeal before the Tenth Circuit with respect to evidentiary rulings surrounding the award of compensatory damages for breach of contract and as well, for what MOUNTAIN FUEL urged to be an erroneous interpretation of the crude oil regulations with respect to the highest posted price in the Dry Piney Field. By reason of Rule 34(d) Federal Rules of Appellate Procedure, MOUNTAIN FUEL, although the Appellee and Cross-Appellant before the Tenth Circuit, became and was treated as the Appellant.

13. JOHNSON OIL did not at any time attempt to undertake an appeal of the final Judgment of the District Court to the Temporary Emergency Court of Appeals (hereafter TECA) with respect to punitive damages or any other issue of crude oil pricing or allocation that had an inexorable relationship to the ESA of 1970 or the Allocation Act of 1973 and the regulations promulgated thereunder.

14. *Jurisdiction.*

During the briefing phase of the appeals, the Tenth

Circuit requested that the parties address the question of the subject matter jurisdiction of the Tenth Circuit to entertain the JOHNSON OIL appeal and/or the MOUNTAIN FUEL cross-appeal. MOUNTAIN FUEL submitted its position on subject matter jurisdiction in its Opening Brief. MOUNTAIN FUEL argued, on the one hand, that the initial Complaint filed in State District Court did not "arise under" the EPAA of 1973, for the MOUNTAIN FUEL cause of action was one for the payment of crude oil sold and delivered and thus, for breach of contract. On the other hand, federal subject matter jurisdiction, it was contended, was extant under section 211 of the ESA, as incorporated by reference into the EPAA under the Answer and Counterclaim of JOHNSON OIL.[1] MOUNTAIN FUEL maintained that in all events, the Tenth Circuit maintained jurisdiction over the non-TECA questions. Pages 19-25 of the MOUNTAIN FUEL Opening Brief to the Tenth Circuit are attached hereto as Appendix 1. JOHNSON OIL concurred with and did not add anything to the MOUNTAIN FUEL statement on subject matter jurisdiction in its Opening Brief.

Upon oral argument of the appeals in September of 1978 (a predominant portion of which was directed to the issue of subject matter jurisdiction of the Tenth Circuit *vis-a-vis* TECA), the Tenth Circuit issued its opinion on November 22, 1978 dismissing both the appeal of JOHNSON OIL and the cross-appeal of MOUNTAIN FUEL for lack of subject

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[1] Under section 211 of the ESA, a case is subject to removal from a state court to federal district court at any time by any party when the constitutionality of the statute or the validity of any agency action (regulation) is called into question under the ESA or the EPAA. Such issue could be raised by complaint, answer, counterclaim or other pleading. Section 211, Economic Stabilization Act.

matter jurisdiction.[2] The Tenth Circuit determined that all issues, *including the punitive damage question raised by JOHNSON OIL*, in the case were TECA-related and that the exclusivity of TECA statutory jurisdiction foreclosed appellate review by the Tenth Circuit.

Both parties filed Petitions for Rehearing. MOUNTAIN FUEL urged that the evidentiary rulings of the trial Court with respect to the breach of contract question and the inconsistency of the trial Court in submitting the tortious business interference claim to the jury while at the same time granting MOUNTAIN FUEL's Motion for a Directed Verdict on punitive damages, were unequivocally non-TECA questions having no relationship to the ESA or the EPAA. JOHNSON OIL, in its Petition, urged that the punitive damage issue was of a non-TECA character and that the Tenth Circuit should proceed to hear the same; on the other hand, MOUNTAIN FUEL contended that the punitive damage question was plainly an outgrowth of claims made by JOHNSON against MOUNTAIN FUEL for alleged violations of the ESA and the EPAA, and was therefore clearly an issue for TECA.

15. On December 20, 1978, the Tenth Circuit denied Petitions for Rehearing of both JOHNSON OIL and MOUNTAIN FUEL.

16. The entitlement of JOHNSON OIL to any compensatory damage or judgment for breach of contract was sharply contested by MOUNTAIN FUEL on evidentiary and

[2] **A conformed copy of the November 22, 1978 Opinion of the Tenth Circuit is attached to the Petition for Certiorari of Johnson Oil pp. 29-65 inclusive.**

legal bases before the trial Court and on appeal to the Tenth Circuit. (Better than 60% of MOUNTAIN FUEL's 74-page Brief to the Circuit was directed to the compensatory damage issue.) Nonetheless, in order to compromise, resolve and put an end to the litigation, upon the mandate in the case being entered in the District Court, MOUNTAIN FUEL, on January 3, 1979, tendered into the Registry of the Court the sum of $47,393.24 to JOHNSON OIL in full payment and satisfaction of the Judgment of May 2, 1977 of the District Court.[3] (See Appendix 2.) Thirteen days later on January 16, 1979, JOHNSON OIL asked the District Court for permission to withdraw the monies from the Registry of the Court and at the same time to reserve any right that it may have as to any other portion of its counterclaim. Upon oral argument, Chief U.S. District Judge Aldon J. Anderson denied the JOHNSON OIL Motion without prejudice to bring the same before the Senior Judge, William G. Juergens, specially assigned to the case. No such Motion was ever brought before Judge Juergens, even though Chief Judge Anderson ordered that it would be procedurally appropriate to so do. (See Appendix 3.)

17. Without notice or motion, JOHNSON OIL, on February 5, 1979, withdrew from the Registry of the District Court the MOUNTAIN FUEL tender and accepted the $47,393.24 in full payment and satisfaction of the May 2, 1977 final Judgment of the District Court. While acknowledging

[3] **Said tender took into account as an offset against the compensatory damage award of $65,000.00 in favor of Johnson Oil, the stipulated judgment in favor of Mountain Fuel, together with interest, for crude oil sold and delivered in the sum of $23,203.99. The net tender and satisfaction of judgment was the sum of $47,393.24.**

full payment and satisfaction of said Judgment, JOHNSON OIL attempted to reserve any right of appeal it otherwise had "on any portion of its counterclaim". (See Appendix 4.)

POINT I

THE CERTIORARI PETITION OF JOHNSON OIL IS IMPROVIDENT AND SHOULD BE DENIED, FOR JOHNSON OIL BY ACCEPTING PAYMENT AND SATISFYING THE JUDGMENT BELOW, HAS WAIVED ANY RIGHT TO REQUEST CERTIORARI REVIEW BY THIS COURT

1. *Johnson Oil Does Not Have Standing to Petition for Certiorari.*

At the threshold of any case brought to this Honorable Court via certiorari procedure under 28 U.S.C. §2101(c), is the standing of the Petitioner to request the issuance of the Writ. *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975). Indeed, the Rules of Practice of this Court, Rule 19 *et seq.*, are implicit that a *sine qua non* of certiorari jurisdiction is that the petitioner be clothed with standing to present the case. If the case is at an end or has become moot by action in the lower Court, or if the cause is no longer justiciable by reason of the lack of standing of the petitioner, certiorari will be denied. *North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed. 2d 418, 92 S.Ct. 402 (1971); *Sears Roebuck & Co. v. Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, et al.*, 397 U.S. 655, 25 L.Ed. 2d 637, 90 S.Ct. 1299 (1970).

Under the extant facts of this Case, the justiciable issues of the controversy have been put to rest and are not open to review. Those facts plainly are that on January 3, 1979, MOUNTAIN FUEL paid the final Judgment of the District Court in the sum of $47,393.24, a Judgment which at the time was keenly disputed. The payment by MOUNTAIN FUEL was made to bring an end to the litigation and hence tender was in "full payment and satisfaction" of the Judgment, inclusive of each and every part thereof. (See Appendix 2.) JOHNSON OIL recovered and accepted MOUNTAIN FUEL's tender in full payment and satisfaction of the Judgment and acknowledged full satisfaction of said Judgment on February 5, 1979. (See Appendix 4.) Such acceptance and acknowledgment stripped JOHNSON OIL of the standing to undertake a Petition for Certiorari to this Court from the very Judgment which it acknowledges to have been satisfied.

2. *The General Rule on Standing and Waiver.*

The controlling precept of law is to the effect that a party cannot accept the benefits or fruits of a non-severable judgment and at the same moment, appeal the specific aspects of the same judgment which cuts against the party. The various Circuit Courts of Appeal have long recognized the proposition. *Smith v. Morris, et al.*, 69 F.2d 3 (CCA 3rd 1934); *Kaiser v. Standard Oil Co. of N.J.*, 89 F.2d 58 (CCA 5th 1937); *Colquette v. Crossett Lumber Co.*, 149 F.2d 116 (CCA 8th 1945); *Luther, et al. v. United States*, 225 F.2d 495 (CCA 10th 1955); *Wilson v. The Pantasote Company*, 254 F.2d 700 (2 Cir. 1958).

As stated by the Tenth Circuit in *Luther*:

"* * * It is a well established general rule of solid

> foundation that a litigant who accepts all or any substantial part of the benefits of a judgment or decree is precluded from asking that such judgment or decree be reviewed on appeal. He cannot avail himself of its advantages and then challenge its disadvantages on appeal. After accepting all or any substantial part of its benefits, he cannot escape its burdens. * * *" (Citations omitted.)

There appears to be two possible exceptions to the general rule that a party may not pocket the monies from a judgment on the one hand, and simultaneously launch an appeal from that judgment on the other hand. The first is that if the judgment is severable or divisible into independent parts, satisfaction of one part of the judgment is not a bar to an appeal of a separate and severable issue. *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978). The second possible exception was suggested by this Court in *United States v. E. B. Hougham, et al.*, 364 U.S. 310, 5 L.Ed. 2d 8, 81 S.Ct. 13 (1960) wherein it was held that in an appeal from a damage award claimed to be inadequate, the acceptance of payment of the compensatory judgment does not, standing alone, amount to a waiver or an accord and satisfaction. The decision in *Hougham* carries with it a strongly-worded dissent by Justices Whittaker and Douglas and at least one treatise writer questions the breadth or reach of the holding. See *Moores Federal Practice*, Vol. 9 ¶203.07 at p. 718.[4]

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[4] **Moore would restrict the opinion in Hougham to the four corners of the facts before the Court therein, characterizing it as a "guarded" opinion:**

> **" * * * Furthermore, the judgment debtor's argument that his payment was offered and accepted as an accord and satisfaction was made untenable by the fact that he himself took the initial appeal from the judgment." 9 Moores Federal Practice at p. 718. (Emphasis added.)**

It is patently clear that the facts of this Case fall unmistakably within the framework of the general rule announced time and again by a legion of federal circuit decisions which have never been overturned. Those facts are that the compensatory damage judgment is an integral facet of the claim of JOHNSON OIL to punitive damages under its Petition for Certiorari herein. But for the compensatory damage judgment, the exemplary damage claim could not stand as a matter of law, regardless of the facts *Maw v. Weber Basin Water Conservancy District*, 20 U.2d 195, 436 P.2d 230 (1968). Ergo, the conclusion is inescapable that the determination of the punitive damage claim was a non-severable or indivisible part of the judgment as to compensatory damages. The punitive damage claim and the compensatory damage claim, while separate causes of action, were non-severable in law, for they were non-severable in fact under the evidence at trial.

It turns out, however, that the compensatory damage judgment was one that was hotly contested and disputed by MOUNTAIN FUEL. Such judgment was made the subject of a cross-appeal by MOUNTAIN FUEL before the Tenth Circuit. When the Circuit dismissed MOUNTAIN FUEL's cross-appeal of the compensatory judgment as well as the direct appeal of JOHNSON OIL on punitive damages, MOUNTAIN FUEL, in order to compromise and resolve a disputed judgment, paid the same, less its offset judgment against JOHNSON OIL, on January 3, 1979. *At no time did MOUNTAIN FUEL acknowledge that the compensatory damage judgment in favor of JOHNSON OIL was, in fact or law, due and owing.*

Thirteen days later, on January 16, JOHNSON OIL filed a Motion before the District Court to permit acceptance of the tender without prejudicing any appellate claims it may have had. Upon hearing, Chief United States District Judge Aldon J. Anderson *denied* the JOHNSON OIL Motion, finding that it had been brought before the wrong judge and that such Motion should be submitted to Senior Judge William G. Juergens, to whom the Case was originally assigned.

But JOHNSON OIL did not take such steps. Rather, it withdrew from the Registry of the Court on February 5, 1979, the draft of $47,393.24 which had been expressly tendered by MOUNTAIN FUEL in full payment and satisfaction of the final Judgment. Although it tried to hedge against the plain implications of an accord and satisfaction and waiver of appeal (including Certiorari to this Court) with the statement that such "acceptance" was not meant to limit its right of appeal on any portion of its counterclaim, *the fact is that JOHNSON OIL did just that.* It recovered the monies, acknowledged satisfaction of the compensatory judgment that was otherwise fervidly contested by MOUNTAIN FUEL and in so doing, accepted the terms of the MOUNTAIN FUEL tender, namely, the satisfaction of judgment and the termination of the litigation on any damage issue whatsoever.

Nor do the facts of this matter fit within the possible exception of *Hougham*. To begin with, in *Hougham* the respondents, themselves, had undertaken the initial appeal, thus expressly negating a finding of accord and satisfaction. Such conduct is the antithesis of MOUNTAIN FUEL's conduct in the Case at Bar. But more to the point, JOHNSON OIL makes no claim in its Petition for Certiorari that the

compensatory damage award or judgment, itself, is inadequate. Indeed, that conclusion is explicit, for JOHNSON OIL did not undertake any appeal to the Tenth Circuit of the compensatory damage judgment, much less incorporate it within the Petition for Certiorari herein. Thus it is that JOHNSON OIL does not seek a higher compensatory damage award as did the Government in *Hougham*. It seeks an award of punitive damages which, while inseparable from the final Judgment on compensatory damages, is not an add-on for further compensatory damages.

3. *Conclusion on Standing.*

JOHNSON OIL is without standing before this Court on the Petition for Certiorari filed. The Judgment of the lower Court was paid by MOUNTAIN FUEL in compromise of and to end the litigation on damage issues. JOHNSON OIL accepted the conditional tender, and acknowledged full satisfaction of the Judgment. Under the exigent facts, the litigation with respect to damages, inclusive of the adjunct issue of punitive damages, is at an end. To find otherwise would be to permit a party to pocket a money judgment which is in dispute and at the same time to appeal that judgment.

POINT II

THERE IS NO CONFLICT, MUCH LESS SUBSTANTIAL OR IRRECONCILABLE DISPARITY, BETWEEN THE DECISION OF THE TENTH CIRCUIT AND TECA

1. *The Basis for Certiorari is Absent.*

Rule 19(b) of the Supreme Court Rules of Practice is the cornerstone upon which the Petition for Certiorari of

JOHNSON OIL must rest. The Rule is unequivocal that in order for a Certiorari Writ to issue to the Tenth Circuit in the instant Case, the Circuit decision must collide with that of TECA on the same matter, or the holding of the Tenth Circuit must stand in opposition to a decision of this Court. The asserted conflict between the Circuit decision and that of TECA requires a finding of square and irreconcilable contradiction in the application of federal law. *Avco Corporation v. Aero Lodge,* 390 U.S. 557, 20 L.Ed. 2d 126, 88 S.Ct. 1235 (1968); *Northeastern National Bank v. United States,* 387 U.S. 213, 18 L.Ed. 2d 726, 87 S.Ct. 1573 (1967). Conflicts between a Circuit and TECA which are only apparent or superficial and which require invented argument to establish the same, will normally result in a denial of Certiorari. *Keller v. Adam-Campbell Co.,* 264 U.S. 314, 68 L.Ed. 705, 44 S.Ct. 356 (1924); *Wisconsin Electric Co. v. Dunmore Co.,* 282 U.S. 813, 75 L.Ed. 728, 51 S.Ct. 214 (1931).

Even assuming, arguendo, the assistance of a square and irreconcilable conflict (not extant in this Case) between the decisions of the Circuit and TECA, the issue, to justify Certiorari must be one of substantial importance, having a significant bearing on the body of federal jurisprudence and persons affected thereby, and/or be of a recurring nature in the cases and controversies. *Lay v. Williams,* 434 U.S. 910, 54 L.Ed. 2d 196, 98 S.Ct. 311 (1977); *Aldinger v. Howard,* 427 U.S. 1, 49 L.Ed. 2d 276, 96 S.Ct. 2413 (1976); *Fuller v. State of Oregon,* 417 U.S. 40, 40 L.Ed. 2d 643, 94 S.Ct. 2116 (1974).

Lastly, the law is squarely settled that in order for the case to be worthy of Certiorari by reason of a conflict of a

Circuit holding with a decision of this Court, that conflict must be of the most direct, substantial and unequivocal character. *Wilkinson v. United States,* 365 U.S. 399, 5 L.Ed. 2d 633, 81 S.Ct. 567 (1961); *Anderson v. Kibbe,* 431 U.S. 145, 52 L.Ed. 2d 203, 97 S.Ct. 1730 (1977).

An evenhanded analysis of the Petition for Certiorari of JOHNSON OIL herein yields the unavoidable conclusion that the decision of the Tenth Circuit with respect to its review of the punitive damage issue raised by JOHNSON OIL is in harmony, not disharmony, with the holdings of TECA as to appellate jurisdiction involving issues under the ESA and the EPAA. On top of that, the holding of the Circuit in this matter is palpably distinguished from the decision of the Supreme Court in *Bray v. United States,* 423 U.S. 73, 46 L.Ed. 2d 215, 96 S.Ct. 307 (1975). Accordingly, Certiorari is not providently laid in this case.

2. *The Position of JOHNSON OIL on Conflict of Circuit and TECA Decisions.*

Taken at its very best, the argument of JOHNSON OIL, in its Petition for Certiorari is that its appeal to the Tenth Circuit, with respect to the directed verdict of the District Court against JOHNSON OIL on entitlement to punitive damages, was and is a non-TECA issue that otherwise was within the general appellate jurisdiction of the Circuit; the argument continues that the Tenth Circuit improperly dismissed the JOHNSON OIL appeal as to punitive damages, because the question was swept out with TECA issues which the Tenth Circuit refused to hear; it is then contended that if the punitive damage issue had been appealed by JOHNSON

OIL in the first instance to TECA rather than the Tenth Circuit, TECA, based upon the case precedent of *Cooper,*[5] *Spinetti,*[6] and its progeny, would have likewise dismissed the issue for lack of subject matter jurisdiction on the basis that TECA is jurisdictionally precluded from hearing non-ESA and non-EPAA questions; the JOHNSON OIL argument concludes on the note that in light of the foregoing, the decision of the Tenth Circuit dismissing the JOHNSON OIL appeal herein (which incorporated what JOHNSON claims to be the non-TECA issue of punitive damages) is in conflict with the decisions of TECA in *Cooper* and *Spinetti, et al.,* and that this Court should take the case on Certiorari to resolve the apparent conflict.

The entire fabric of the JOHNSON OIL position in its Certiorari Petition is wedded to the notion that the question of punitive damages in the instant litigation is a federal common law issue with the general appellate jurisdiction of the Tenth Circuit and that it has no nexus to any TECA issue under the ambit of the ESA or the Allocation Act. It is altogether clear that if the contrary proposition is correct and that the question of punitive damages in this Case requires the interpretation of statute and/or regulation of the ESA and the Allocation Act as the Tenth Circuit so determined, the entire Petition of JOHNSON OIL falls of its own weight, notwithstanding the argument made in Point I of this Brief.

3. *The Issue of Punitive Damages Raised by JOHNSON OIL on Appeal was Plainly a Question for TECA Under the Controlling Law.*

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[5] **United States v. Cooper, 482 F.2d 1393 (Em.App. 1973).**
[6] **Spinetti v. Atlantic Richfield Company, 522 F.2d 1401 (Em.App. 1975).**

A fair reading of the JOHNSON OIL Brief before the Tenth Circuit, as well as the decision of the Tenth Circuit, itself, places the matter beyond any reasonable debate that the question of whether there was sufficient evidence before the trial Court to sustain, as a matter of law, a finding of punitive damages in favor of JOHNSON OIL and against MOUNTAIN FUEL, was within the sole jurisdictional province of TECA and not the Tenth Circuit.

JOHNSON OIL is correct in its assertion, at page 22 of its Petition, that a substantial portion of its appeal to the Tenth Circuit was devoted to a discussion of the evidence which it claimed allegedly supported a reinstatement of the punitive damage award of the jury. The flaw in JOHNSON OIL's argument, however, is the very character and substance of that evidence which JOHNSON OIL argued to support the exemplary damage issue. Such argument was fundamentally directed to crude oil pricing and allocation practices of MOUNTAIN FUEL *vis-a-vis* JOHNSON OIL pursuant to federal regulations under the ESA and the Allocation Act. In the opening lines of the JOHNSON OIL Brief to the Circuit, the contention is that punitive damages were recoverable against MOUNTAIN FUEL because of a violation of such federal Statutes:

> "It is submitted that Mountain Fuel, by disregarding the *government freeze order, making illegal charges above the ceiling price, by disregarding the terms of the written contract with Johnson,* and by wrongfully and intentionally interfering with Johnson's contractual relationship with Allied Chemical establishes an aggravated case of wanton and oppressive conduct as defined by the court." Johnson Oil Opening Brief to Tenth Circuit p. 7. [Emphasis added.]

At page 10 through 21, inclusive, of its Circuit Brief, JOHNSON OIL urged that the "illegal overcharge" of MOUNTAIN FUEL for "new" and "released" oil as against "old" oil and the alleged overcharge of $.44 per barrel above the regulated posted price in the area were grounds for punitive damages. From pages 22 to 27 inclusive, JOHNSON OIL argued, as a basis for punitive damages, that "Mountain Fuel Ignored Governmental Freeze" under the Allocation Act of 1973 and promulgated regulations of the Federal Energy Office. JOHNSON OIL argued therein that it was not required under the regulations to take "new" or "released" oil as defined by the oil regulations, and therefore was entitled to receive "old" oil at the old oil price under the Allocation Act.

Throughout the Brief to the Tenth Circuit the JOHNSON OIL argument is fairly drenched with allegations that MOUNTAIN FUEL violated the government allocation order with respect to "new" and "released" oil, that it intentionally overcharged JOHNSON OIL contrary to agency regulations of the ESA, and that it illegally adopted a posted price for Dry Piney crude oil, all of which entitled it to punitive damages. All of the charges of JOHNSON OIL that MOUNTAIN FUEL violated the regulations of the ESA and the Allocation Act were vigorously opposed by MOUNTAIN FUEL. Such charges required interpretation of the administrative regulations by the appellate Court in light of the rulings of the District Court. To suggest that the JOHNSON OIL claim of punitive damages was not directly linked to alleged violations of the ESA and the Allocation Act would not only be inaccurate, it would be a fantasy.

The Tenth Circuit added its stamp of acknowlegement that the JOHNSON OIL Counterclaim, including the Amended Counterclaim for punitive damages, implicated federal laws and regulations under the ESA and the EPAA. Writing for the Court, Circuit Judge Barrett stated:

> "We have previously noted that the issues tried in this case were those framed by the Johnson Counterclaim. *The allegations set forth in that Counterclaim invoked and implicated United States laws under the ESA of 1970, 12 U.S.C.A. §1904 Note (Supp. 1977); the EPAA of 1973, 15 U.S.C.A. §§751, et seq., and the implementing regulations duly promulgated thereunder 6 CFR §150.353 (1974); 10 CFR §211.63 (a) (1977).* These regulations spell out the two-tier pricing system established in 1973 which provides that 'old oil' may not be sold above the lower tier ceiling price, 10 CFR §212.72 (1977) and that 'new oil' may not be sold above the upper tier ceiling price, 10 CFR §212.74 (1977). *Allegations against Mountain Fuel involve its alleged disregard of the government 'freeze order,' making 'illegal' charges above the 'ceiling prices,' and requiring Johnson to purchase 'old,' 'released' and 'new' oil at illegal prices contrary to government regulations.*" 586 F.2d at 1384. [Emphasis added.]

The Tenth Circuit went on to state that any claim by JOHNSON OIL that any strict "contract law allegations" made by JOHNSON OIL against MOUNTAIN FUEL *were inseparable* from the federal acts and regulations cited above and that JOHNSON OIL so acknowledged the same to the Circuit in its appellate brief. The Circuit concluded with the affirmative statement that:

> "We hold that this court is without jurisdiction to entertain this appeal. In our view, exclusive jurisdic-

tion vests in the TECA by virtue of 28 U.S.C.A. §1331 (Supp. 1977); 15 U.S.C.A. §754(a)(1), which incorporates §211 of the ES Aof 1970, 12 U.S.C.A. corporates §211 of the ESA of 1970, 12 U.S.C.A. §1904 Note (Supp. 1977)." *Id.*

The ESA and EPAA pled and argued by JOHNSON OIL invoked the mandatory and exclusive jurisdiction of TECA and it was TECA and not the Tenth Circuit as to which the JOHNSON OIL appeal on punitive damages should have been directed. The Tenth Circuit properly dismissed the JOHNSON OIL appeal on that score as well as other TECA related issues.

4. *The Holding of the Tenth Circuit Herein is not in Conflict with the Decisions of TECA.*

Little time need be spent in squaring the instant decision with the decisional precedent of TECA, in view of what has already been said. While JOHNSON OIL is heard to argue that the holdings of the TECA Court in *United States v. Cooper*, 482 F.2d 1343 (Em.App. 1973), *Associated General Contractors of America v. Laborers International Union of North America*, 489 F.2d 749 (Em.App. 1973) and *Spinetti v. Atlantic Richfield Company*, 522 F.2d 1401 (Em.App. 1975) are in substantial conflict with the opinion of the Tenth Circuit in the Case at hand, its argument on the subject falls far short of persuasive.

There is nothing remarkable about *Cooper, Associated General Contractors*, and *Spinetti*, they all assert the same axiom of law — that TECA is a court of limited, statutory jurisdiction under the EPAA of 1973, which incorporates section 211 of the ESA of 1970, and that claims or appeals

having no bearing upon or nexus to the ESA or the EPAA are without its jurisdiction. Thus in *Spinetti*, TECA declared that separate antitrust, Fair Trade, and contractual claims, having no foundation under either the Stabilization Act or the Allocation Act, were not properly before it and could only be appealed to the Court of Appeals (in that case the Ninth Circuit).

TECA has been consistently conspicuous in recognizing its restricted judicial field of operation. *Longview Refining Co. v. Shore, et al.*, 554 F.2d 1006 (Em.App. 1977); *Associated General Contractors of America, supra.* While there is nothing novel about the string of TECA decisions proclaiming that the Court will not entertain appeals which are not grounded in the ESA or the Allocation Act, there is, at the same moment, nothing inconsistent with the enunciated doctrine.

It is to state all but the obvious that the decision of the Tenth Circuit in the Case at Bar dismissing the JOHNSON OIL appeal on the question of punitive damages, is not out of step or in conflict with the holdings of TECA. Indeed, whatever else might be said about the Opinion of the Circuit in this Case, the dismissal of the JOHNSON OIL appeal on punitive damages was not only eminently correct, it was in lockstep with the holdings of TECA above-cited.

The Circuit found, with unmitigated cause, that JOHNSON OIL's claim and appeal on punitive damages was grounded in and arose out of the interpretation and construction of the ESA, the Allocation Act, and administrative regulations thereunder. In point of fact, the principal targets

of the JOHNSON OIL appeal, on exemplary damages, was the alleged violation by MOUNTAIN FUEL of the ESA and the Allocation Act. The Tenth Circuit could not have entered upon an examination of the evidence or the law which JOHNSON OIL claimed for its punitive damage appeal without running headlong into the judicial interpretation and construction of the ESA, the EPAA, and the regulations. Accordingly, it is not too much to say that the holding of the Tenth Circuit on this issue is entirely consistent with the rationale of the TECA precedent cited.

This is not to say that the creation of TECA and the specific parameters of its jurisdiction *vis-a-vis* the general jurisdiction of the Court of Appeals, may not present considerable procedural problems for a litigant in a given case. The prospects of bifurcated jurisdiction between TECA and the Court of Appeals in a multi-claim case or whether or not a claim presents a TECA question, is not always the subject of quick or simple determination. But it is to say that under the facts of this Case, the ruling of the Tenth Circuit in the punitive damage appeal of JOHNSON OIL was squarely on the mark and completely comports with the decisions of TECA on the same subject.

POINT III

THE HOLDING OF THE TENTH CIRCUIT IN THE INSTANT CASE IS PLAINLY DISTINGUISHED FROM THE DECISION OF THIS COURT IN BRAY V. UNITED STATES

JOHNSON OIL, at page 21 of its Brief, attempts to suggest that the decision of the Tenth Circuit in the instant litigation is at odds with the *per curiam* opinion of the Supreme Court in *Bray v. United States*, 423 U.S. 73, 46 L.Ed. 2d 215, 96 S.Ct. 307 (1975). Such suggestion is wrong and for the wrong reasons. In *Bray*, the defendant was cited for criminal contempt under 18 U.S.C. §401 for failure to produce records in connection with an investigation of possible violations of the ESA. This Court held that the contempt citation did not arise under the ESA of 1970 but rather under the Criminal Contempt Statute, 18 U.S.C. §401 and ergo, the case was properly within the general appellate jurisdiction of the Tenth Circuit.

The facts in *Bray* are a far cry from those facing JOHNSON OIL in this Case. The punitive damage appeal of JOHNSON OIL is firmly grounded in claimed violations by MOUNTAIN FUEL of both the ESA and the EPAA and only that Court (namely TECA) which maintains jurisdiction to interpolate and construe the crude oil statutes and regulations could pass upon and ascertain whether such claimed violations had in fact occurred and could sustain a claim for punitive damages.

The decision of this Court in *Bray* is distinguished on its facts from the facts of the instant Case. Moreover, the holding of the Tenth Circuit on the JOHNSON OIL appeal on punitive damages is in full conformity with the opinion in *Bray*. Indeed, the Tenth Circuit cites *Bray* at length in support of its ruling. See 586 F.2d at 1383.

The argument of JOHNSON OIL with respect to the *Bray* Case is bankrupt.

POINT IV

THIS COURT SHOULD NOT, AND IN LAW, IS UNABLE TO INVENT TRANSFER JURISDICTION FROM THE CIRCUIT COURT TO TECA OR VICE VERSA

JOHNSON OIL argues in Point II of its Petition for Certiorari that this Court should decree a method in which appeals, which are improvidently filed in the Tenth Circuit, could be transferred to TECA for adjudication. JOHNSON OIL in the same breath also urges the flip side of the proposition, viz., that this Court should judicially provide for transfer jurisdiction for appeals improvidently filed with TECA to an appropriate Circuit.

The short answer to the position of JOHNSON OIL is that this Court is not engaged in the business of inventing and restructuring new jurisdiction for either Courts of Appeal or TECA. It is an axiomatic canon that the Courts of Appeal and TECA are Article III Section 1 tribunals under the United States Constitution and that the Congress is the only entity with power to establish or modify the core, reach, or field of jurisdiction of such appellate courts. The appellate review jurisdiction of the Courts of Appeal are prescribed by the Congress under 28 U.S.C. §2101, *et seq.*, while TECA jurisdiction is set forth in section 211 of the Economic Stabilization Act incorporated into 15 U.S.C. §754 of the Emergency Petroleum Allocation Act.

This Court could not provide for transfer jurisdiction from a Circuit to TECA or back, any more than it could legislate a ruling allowing for transfer from one circuit to another,

in the event that a litigant had mistakenly filed his appeal in the event that a litigant had mistakenly filed his appeal in the wrong court of appeals. *Owen Equipment and Erection Company v. Kroger*, ... U.S. ....., 57 L.Ed. 2d 274, 98 S.Ct. 2396 (1978).

JOHNSON OIL cites no authority whatsoever that would begin to permit this Court to enter the legislative arena and reconstruct the appellate review jurisdiction of the Courts of Appeal or TECA. Its argument is without merit and should be denied.

POINT V

IF THIS COURT WERE TO GRANT THE PETITION FOR CERTIORARI OF JOHNSON OIL HEREIN, THE WRIT SHOULD ISSUE AS TO ALL FACETS OF THE CASE, INCLUDING THE QUESTIONS RAISED BY MOUNTAIN FUEL IN ITS CROSS-APPEAL BEFORE THE TENTH CIRCUIT

It is plain enough that the Petition for Certiorari of JOHNSON OIL in this matter is not well taken for a variety of reasons and should be denied. If, notwithstanding the arguments submitted in this Opposition Brief, this Court determines that Certiorari should be granted, the Writ to be issued to the Tenth Circuit should be directed to the entire case, and all facets thereof, inclusive of the Cross-Appeal of MOUNTAIN FUEL on the issue of breach of contract.

If any party in the instant litigation had provocation to urge that the Tenth Circuit erroneously dismissed its appeal, it is MOUNTAIN FUEL and not JOHNSON OIL. MOUN-

TAIN FUEL raised by way of its Cross-Appeal the common law question of whether it breached its contract with JOHNSON OIL by terminating further sales of crude oil by reason of JOHNSON OIL's failure tc pay for previous sales. The evidence that was permitted by the trial Court regarding the alleged breach of contract on the part of MOUNTAIN FUEL was erroneous in several parts and the testimony on damages was speculative, without foundation, and inadmissible. Thus, the alternative position of MOUNTAIN FUEL is that the breach of contract issue, particularly in light of the contradictory rulings of the trial Court, involved non-TECA questions and should, in all events have been heard by the Tenth Circuit.

MOUNTAIN FUEL does not propose that this Court scrub the arguments advanced herein and somehow grant the Petition for Certiorari of JOHNSON OIL. It does respectfully submit, however, that if Certiorari is permitted, the breach of contract issue under the MOUNTAIN FUEL Cross-Appeal is such an integral part of the punitive damage issue of JOHNSON OIL, that the MOUNTAIN FUEL Cross-Appeal should be, as well, brought before the Supreme Court for review.

CONCLUSION

The Petition of JOHNSON OIL for Certiorari is insipid and unfounded. It does not reach the requirements of Rule 19 with respect to a provident grant of Certiorari, for the decision of the Tenth Circuit does not do violence to any holding of the Supreme Court and it is not in conflict with any case precedent of the TECA Court. The JOHNSON OIL appeal of the Tenth Circuit on the issue of punitive damages

was ladened with issues under and requiring the interpretation of the ESA of 1970 and the EPAA of 1973, by TECA. The JOHNSON OIL appeal in the Tenth Circuit on punitive damages was properly dismissed.

JOHNSON OIL has no standing to bring the instant Petition for Certiorari before this Court. It accepted in full satisfaction of the final Judgment the tender by MOUNTAIN FUEL in payment of that Judgment. It may not accept the fruits of the Judgment in one hand and instantaneously contest or appeal that Judgment with the other hand.

The Petition of JOHNSON OIL should be, by this Court, denied.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.

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Salt Lake City, Utah 84101

Attorney for Mountain Fuel Supply Company, Respondent

April 16, 1979

that there was no evidence to support the claim of business interference although the verdict was not modified to so reflect. (R. 314-15.)

Pursuant to the stipulation of counsel prior to the trial, the issue of JOHNSON's entitlement to statutory overcharges, civil penalties, attorney's fees and costs were reserved for post-trial determination by the Court. By Order dated December 23, 1976, it was held that JOHNSON could not recover any such overcharges, penalties or fees. (R. 321-26.)

14. Entry of Judgment.

Upon the resolution of all outstanding issues, a Final Judgment and Order on Particular Issues and Judgment of Verdict of Jury was entered by the trial Court on May 2, 1977. (R. 327-29.)

JURISDICTION

The Court has, on its own motion, raised the issue of whether it properly has jurisdiction over the subject matter of this appeal or whether the matter should be submitted to the Temporary Emergency Court of Appeals (hereinafter "T.E.C.A."). It is the position of MOUNTAIN FUEL that this Court has jurisdiction to hear and adjudicate each of the claims of the respective parties in that this is not a case which "arises under" the Allocation Act of 1973, insofar as that term has been generally defined. Further, MOUNTAIN FUEL asserts that this Court retains, in all events, jurisdiction over those issues not directly related to the Allocation Act or the regulations promulgated thereunder.

1. To come within the exclusive jurisdiction of T.E.C.A. the case must "arise under" the Allocation Act.

It is recognized, at the outset, that § 211 of the ESA (as incorporated into the Allocation Act) affirmatively provides:

> "[T]he Temporary Emergency Court of Appeals shall have the exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." 12 U.S.C. § 1904 Note (emphasis added).

While the statute would seem to be clear on its face, it has proven difficult in application. But at the very least, under its own terms, § 211 is operative only as to those matters that "arise under" the Acts.

The meaning of the term "arise under," although specifically addressed in other contexts, has seldom been reviewed in the context of the 1970 and 1973 Acts. Indeed, in only one instance has a United States Court of Appeals attempted to interpret the meaning of "arise under" as specifically used in the 1970 Act. In St. Mary's Hospital of East St. Louis, Inc. v. Ogilvie, 496 F.2d 1324 (7th Cir. 1974), the Seventh Circuit, after first citing §211 of the 1970 Act, enunciated the test for determining when an action "arises under" the Act:

> "We interpret the phrase "arising under" as requiring that the allegations of the complaint, not merely the answer, call for the application of the Economic Stabilization Act to the suit. In the absence of such triggering allegations in the complaint, the court of appeals has jurisdiction over the appeal." 496 F.2d at 1326 (emphasis added).

In determining the meaning of the phrase "arise under," the Seventh Circuit noted that the test espoused by it was little

more than the test traditionally employed for determining the existence of federal jurisdiction. The statute which gives rise to federal jurisdiction, 28 U.S.C. §1331(a), specifically requires that an action "arise under" the Constitution, laws or treaties of the United States. Further, it is a well-settled rule of law that in determining whether an action falls within the limits of § 1331 so as to confer jurisdiction, a Federal Court may look only to the complaint for the requisite allegations.

The question, not surprisingly, comes up most frequently in cases where there has been removal from a State to a Federal Court. In the leading case of Pan American Petroleum Corporation v. Superior Court, 366 U.S. 656 (1961), the United States Supreme Court, in a unanimous decision, enunciated the rules for determining when subject matter jurisdiction obtains in the Federal Court. Therein, the Court, speaking through Mr. Justice Frankfurter, observed:

> "It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law." 366 U.S. at 663 (emphasis added).

The Court then declared, citing from its decision in Gully v. First National Bank, 299 U.S. 109 (1936):

> "Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, an essential one, of the plaintiff's cause of action . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .'" Id. (emphasis added).

And further, the Court, in Pan American, noted:

> "For this requirement it is no substitute that the defendant is almost certain to raise a federal defense." Id.

Since Pan American, as does the case at hand, involved an issue of exclusive jurisdiction, the Court was compelled to note that "exclusive jurisdiction" under the federal act applied only to those suits which could be brought in Federal Court in all events. As it was the ruling of the Supreme Court that federal jurisdiction did not appear upon the face of the complaint, the Court found the statutory grant of exclusive jurisdiction wholly inapplicable. 366 U.S. at 664.

That the Tenth Circuit has consistently followed the so-called "well-pleaded complaint" rule in federal-question cases and thus should apply the same test to determine jurisdiction under the 1970 and 1973 Acts herein, cannot be disputed. One of this Court's most recent pronouncements of the rule is found in Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975). In that case, this Court, in holding that jurisdiction was not providently laid under 28 U.S.C. § 1331, said:

> "It has been suggested that the proper test under § 1331 for finding original federal jurisdiction is that there be a 'substantial claim founded directly upon federal law.' In deciding whether the matter in controversy involves such a claim, only the complaint should be examined, and, indeed, only those parts of the complaint directly and necessarily relating to the plaintiff's cause of action should be considered." Id. at 481 (emphasis added).

See also, North Davis Bank v. First National Bank of Layton, 457 F.2d 820 (10th Cir. 1972) and Chandler v. O'Bryan, 445 F.2d 1045

(10th Cir. 1971). See, in addition, Rath Packing Co. v Becker, 530 F.2d 1295 (9th Cir. 1975), wherein the Ninth Circuit recently held that a federal issue raised in a counterclaim was also not sufficient to bestow jurisdiction on a Federal Court.

The case at bar, under the undisputed facts, falls squarely within the parameters of the "well-pleaded complaint rule" of St. Mary's and Mescalero. The record before the Court indicates that MOUNTAIN FUEL originally instigated this action in one of the District Courts for the State of Utah. The original, and only, Complaint filed by MOUNTAIN FUEL, in the State District Court for Utah, did not, in any sense, involve itself with or raise substantive issues concerning either the 1970 or 1973 Acts or any regulations promulgated thereunder. (R. 4-7.) Indeed, the Complaint alleges a cause of action sounding solely in breach of contract. Paragraph 4 of the Complaint reads:

> "4. That on or about the 15th day of July, 1970, the parties entered into a written agreement, a copy of which is attached hereto, referred to hereby and incorporated herein." (R. 4.)

While it is true that Paragraphs 6 and 7 of the Complaint (R. 5) allude to "Phase IV" oil regulations promulgated by the CLC, such does not change the essence or character of the Complaint. The said regulations are neither attacked nor sought to be enforced. Nowhere on the face of the Complaint does MOUNTAIN FUEL ask for an interpretation or application of the regulations.

It is equally clear from the record that the issues involving the 1970 and 1973 Acts were specifically raised by the

Defendant, essentially in the nature of a defense, in the Answer and Counterclaim. (R. 20-23.) Thus it is that under the prevailing and dispositive case law, the action on appeal herein did not, and does not, "arise under" the ESA or the Allocation Act, as is required by the operative provisions of §211 of the 1970 Act.

It should further be noted that the cases cited by letter of counsel for the Clerk of the Court dated September 13, 1977, are not controlling in the instant case. Each of the cases deals with a situation wherein the issues involving the Allocation Act were expressly raised and confronted by the initial complaint of the plaintiff. See, for example, Withington v. F.E.A. and Frank Zarb, No. 76-1612 (10th Cir. August 25, 1976).

2. Even were it assumed for the sheer sake of argument that T.E.C.A. does have jurisdiction, the same is limited strictly to those issues which deal directly and substantively with the 1970 and 1973 Acts.

Since T.E.C.A. is a Court of special jurisdiction, it has been held numerous times that the exercise of jurisdiction by T.E.C.A. must be strictly construed and narrowly defined. In the case of Spinetti v. Atlantic Richfield Company, 522 F.2d 1401 (Em. App. 1975), T.E.C.A., itself, held that it had jurisdiction to hear only those issues dealing directly with the validity, interpretation or application of the Acts or their regulations. In Spinetti, the Plaintiff brought an action in Federal Court alleging, in separate counts, antitrust, fair trade and contractual violations. In addition, the plaintiff alleged that the conduct of the defendant violated certain of the regulations issued pursuant to the Allocation Act. On appeal, T.E.C.A. held that

while it did have jurisdiction over that count of the complaint alleging violations of the Allocation Act, it did not have jurisdiction over the remaining counts since the same did not arise under the Act. Said the Court:

> "The antitrust, Fair Trade and contractual claims are appealable only to the Ninth Circuit Court of Appeals . . . . As stated in United States v. Cooper, 482 F.2d 1393, 1398 (Em. App. 1973: '[C]ourts of special jurisdiction should strictly construe their statutory grants of jurisdiction.'" Id. at 1403.

The Spinetti decision is persuasive in the instant case for two reasons. First, it is support for the application of the "well-pleaded complaint" rule discussed hereinabove. It is clear that in Spinetti, T.E.C.A. limited its exercise of jurisdiction only to those issues which, on the face of the complaint, dealt directly with the Allocation Act. Second, it illustrates that T.E.C.A., as a Court of special jurisdiction, has no authority to review "pendant" claims or issues.

3. Conclusion as to Jurisdictional Issue.

This Court has a firm hand on subject matter jurisdiction on each and all of the issues, including "posted price" and "allocation" of Dry Piney crude oil, on appeal herein, whether those issues are raised under the cross-appeal of MOUNTAIN FUEL or the main appeal of JOHNSON. In the unlikely event it is determined that the issues of "posted price" and "allocation" under the 1970 and 1973 Acts are ones of exclusive jurisdiction with T.E.C.A., only those specific issues should be referred to that Court.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation, Plaintiff, vs. RELAND JOHNSON and JOHNSON OIL COMPANY, Defendants.	:	TENDER OF SATISFACTION OF JUDGMENT Case No. Nc-75-3

COMES NOW the Plaintiff, MOUNTAIN FUEL SUPPLY COMPANY, by and through its counsel of record, ROBERT S. CAMPBELL, JR., and herewith tenders the sum of $47,393.24 in full payment and satisfaction of that certain Judgment entered in the above-styled action on May 2, 1977. The sum has been calculated as follows:

Original judgment	$65,000.00
Less: Amount due to Mountain Fuel Supply for crude oil purchases of Johnson Oil, together with interest at the rate of 6% per annum from the date of each partial payment to the date of judgment.	23,203.99
	$41,796.01
Plus interest at the rate of 8% per annum on the balance from May 2, 1977, the date of judgment, to January 3, 1979.	5,597.23
Total Judgment	$47,393.24

Said sum is also exclusive of costs, which were awarded to the Defendant as a part of the Final Judgment but which have not, as yet, been taxed by the Clerk of the Court.

DATED this 3rd day of January, 1979.

ROBERT S. CAMPBELL, JR.
of and for
WATKISS & CAMPBELL
310 South Main Street, 12th Floor
Salt Lake City, Utah 84101

Attorneys for Plaintiff
Mountain Fuel Supply Company

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation, Plaintiff, vs. RELAND JOHNSON and JOHNSON OIL COMPANY, Defendants.	:	ORDER WITHOUT PREJUDICE Case No. NC-75-3

The Motion of the Defendant, JOHNSON OIL COMPANY, permitting it to withdraw and accept the Tender of Satisfaction of Judgment of Plaintiff with reservation to pursue an appeal or any other portion of its Counterclaim having come on for hearing before this Court, the Honorable ALDON J. ANDERSON, Chief United States District Judge presiding, on Thursday, the 18th day of January, 1979, Plaintiff being represented by its counsel ROBERT S. CAMPBELL, JR., ESQ. of WATKISS & CAMPBELL and the Defendant being represented by its counsel JOSEPH C. RUST of KIRTON & MC CONKIE, and the Court having heard argument in connection with Plaintiff's Motion and being advised in the premises,

NOW THEREFORE, good cause appearing, IT IS HEREBY ORDERED that the proceedings in this case have been and are before Senior U. S. District Judge WILLIAM G. JUERGENS, that it is procedurally appropriate that Plaintiff's Motion be brought before Judge Juergens for review and disposition and this Court defers to Judge Juergens in the matter;

IT IS FURTHER ORDERED that the Motion of the Defendant, JOHNSON OIL COMPANY, be and the same is hereby denied without prejudice to bring the matter before Judge Juergens for review and determination.

DATED this 19 day of January, 1979.

BY ORDER OF THE COURT

ALDON J. ANDERSON
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

* * * * * * * *

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,

Plaintiff,

vs.

RELAND JOHNSON and JOHNSON OIL COMPANY,

Defendants.

ACCEPTANCE OF TENDER OF SATISFACTION OF JUDGMENT

Case No. Nc-75-3

* * * * * *

Defendants Johnson Oil Company and Reland Johnson accept plaintiff's tender of satisfaction of judgment to the extent as the same is described in plaintiff's Tender of Satisfaction of Judgment on file with the Court herein and with the explicit understanding that defendants did not receive deliveries of oil from Mountain Fuel between the date of the jury verdict of June 23, 1976 and November of 1976 when deliveries of oil were resumed, and that plaintiff's Tender of Satisfaction of Judgment does not resolve or satisfy defendants' claim to those deliveries, and with the further understanding that this acceptance is not meant in any way to limit defendants' right of appeal on any portion of its counterclaim.

Dated this 5th day of February,1979.

KIRTON & McCONKIE

JOSEPH C. RUST
KIRTON & McCONKIE
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